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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Application of **ECHOSTAR COMMUNICATIONS CORPORATION,** **GENERAL MOTORS CORPORATION,** **HUGHES ELECTRONICS CORPORATION,** Transferors, and **ECHOSTAR COMMUNICATIONS CORPORATION,** Transferee. For Authority to Transfer Control.	***EXPEDITED ACTION REQUESTED*** **CS** Docket No. 01-348
Application of **ECHOSTAR SATELLITE CORPORATION** **AND HUGHES ELECTRONICS CORPORATION** for Authority to Launch and Operate NEW ECHOSTAR 1 (USABBS-16)	CS Docket No. 01-348 File No. SAT-LOA-20020225-00023 S2435

To: The Presiding Officer and Chief Administrative Law Judge, Richard L. Sippel

MOTION TO DELETE AND CLARIFY ISSUES

Gary M. Epstein
James H. Barker
LATHAM & WATKINS
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
202-637-2200

*Counsel for General Motors Corporation and **Hughes** Electronics Corporation*

Pantelis Michalopoulos
Philip L. Malet
Carlos M. Nalda
Rhonda M Bolton
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036-1795
202-429-3000
Counsel for EchoStar Communications Corporation

November 27, 2002

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MOTION TO DELETE AND CLARIFY ISSUES

Pursuant to Section 1.229 of the Commission's Rules, 47 C.F.R. § 1.229, EchoStar Communications Corporation ("Echostar"), General Motors Corporation ("GM) and Hughes Electronics Corporation ("Hughes"), **a** wholly owned subsidiary of GM (collectively, the "Applicants"), hereby move the Presiding Officer to delete and clarify certain issues currently designated for hearing. The Applicants believe that the amended application being filed with the Commission concurrently with this motion[1] obviates the need for a hearing altogether, and have also filed with the Commission a petition to suspend the hearing pending Commission review of that application. Even if the Commission were to deny that suspension request, however, the Applicants submit that, in light of the amended application as well as other factors, there is no need for the Presiding Officer to conduct a hearing to determine: (1) the product market; (2) the geographic market and the number of subscribers per market; (3) the transaction's effect on viewpoint diversity; and (4) the transaction's effect on the Commission's spectrum policies.[2] As set forth below, even if the Commission were to determine it should go forward with an evidentiary hearing in this proceeding, the amended application by its nature renders moot all of the aforementioned issues designated for hearing in the *HDO*. In addition, the Applicants move the Presiding Officer **to** clarify another issue set for hearing in the *HDO*.

I. INTRODUCTION AND SUMMARY

The Commission has invited the Applicants to amend their merger application and request a suspension of the hearing.[3] The Applicants today have filed with the Commission **an** amended application and a Petition for Suspension of the Hearing.[4] The amendment

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[1] *See Amendment to Consolidated Application for Authority to Transfer Control,* CS Docket No. 01-348 (Nov. 27,2002) ("Amendment").

[2] *See Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee,* Hearing Designation Order, FCC 02-284, CS Docket No. 01-348, at ¶ 289 (rel. Oct. 18,2002) *("Hearing Designation Order"* or *"HDO").* Specifically, the Applicants request deletion of Issues 1(a), 1(b), 2(a) and 2(b).

[3] *HDO* at ¶ 295.

[4] *See* Amendment; *see also* Petition for Suspension of Hearing, CS Docket No. 01-348 (Nov. 27,2002) ("Petition to Suspend").

submitted by the Applicants, which involves the transfer of Commission authorizations and satellite capacity for the 61.5"W.L. and 148° W.L. orbital locations from EchoStar to R/L DBS Company, LLC ("Rainbow"), has significant implications for all of the issues designated for hearing by the Commission.

The remedial measures proposed by the Applicants in the amended application will create another viable competitor in the MVPD market within the time frame considered by the Commission in its merger analysis – a competitor that will in fact be more robust than either EchoStar or DIRECTV today.[5] As a result, the Applicants believe that the amended application entirely eliminates the need for an evidentiary hearing.[6] However, even if the Commission were to determine to go forward with an evidentiary hearing, there would be no need for a hearing on the following issues: (i) the product market; (ii) the geographic market; (iii) the transaction's effect on viewpoint diversity; and (iv) the transaction's effect on the Commission's spectrum policies.

The Applicants are filing the instant motion contemporaneously with the Amendment and Petition to Suspend out **of** an abundance of caution because the due date for all of these pleadings is today.' The Presiding Officer need only rule on the instant motion if the Commission declines to suspend the hearing or, having suspended the hearing, subsequently

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[5] *HDO* at ¶¶ 140, 143 & n.382 ("Pursuant to the *DOJ/FTC Guideline* test of whether entry is sufficiently easy, we consider whether 'entry would be timely, likely and sufficient in magnitude, character, and scope to deter or counteract the competitive effects of concern' and likely to occur *within two **years.")*** (emphasis added).

[6] Petition to Suspend at 2.

[7] **See** 47 C.F.R. § 1.229(a) (establishing deadline for filing motions to enlarge, change or delete issues); *HDO* at ¶ 295 (specifying deadline for filing amendment and motion to suspend hearing).

reinstates it. In the latter instance, the Applicants reserve the right to amend or supplement this motion to reflect intervening developments.

II. OVERVIEW OF THE AMENDED APPLICATION

As noted earlier, in order to cure the Commission's concerns regarding the merger transaction, the Applicants are filing contemporaneously with this motion an amendment to their merger application that will ensure the creation and competitive viability of an additional, facilities-based DBS competitor -- Rainbow, an indirect wholly-owned subsidiary of Cablevision Systems Corporation ("Cablevision"). Specifically, the Applicants request approval of the merger conditioned on the consummation of an agreement that will include assignment of EchoStar's FCC authorizations at 61.5" W.L. and 148° W.L. and associated satellite resources to Rainbow as well as resale of New EchoStar's services by Rainbow. This remedy is significantly broader than the proposal presented by the Applicants to the Department of Justice on October 21,2002.[8]

Under this proposed remedy, the parties and New EchoStar would agree, as a condition to approval of the merger, to, among other things:

- Divest to Rainbow EchoStar's license for 11 licensed frequencies at the 61.5 W.L. slot;
- Assign to Rainbow the right to operate over 6 frequencies at the 61.5 W.L. slot that EchoStar uses under a lease with Dominion (assuming, as EchoStar has preliminarily concluded, that the lease permits assignment by EchoStar);
- Divest to Rainbow EchoStar's license for 24 frequencies at the 148 W.L. slot;

[8] The Applicants will soon file a separate application seeking the Commission's approval for the license transfers encompassed by this transaction.

- Divest to Rainbow Echostar's Special Temporary Authority for 2 unassigned frequencies at the 61.5 W.L. slot and 8 frequencies at the 148 W.L. slot:

- Divest to Rainbow the EchoStar III satellite by sale and the EchoStar I and II satellites by lease, providing sufficient capacity to carry Rainbow's transmissions on the divested spectrum;

- Share with Rainbow facilities for local signal collection and backhaul of local broadcast transmissions, thereby reducing Rainbow's costs of offering local broadcast channels on its DBS service;

- Grant to Rainbow resale rights. New EchoStar will license to Rainbow the right to resell New Echostar's full line of DBS services, including all new and enhanced DBS services enabled by the merger. In return, under the proposal, Rainbow would license its full product line to New EchoStar for New EchoStar to resell to its subscribers. This means that services provided from the entire DBS orbital spectrum of 61.5°, 101°, 110°, 119°, 61.5° and 148° W.L. locations will be available to all customers of New EchoStar and to all customers of Rainbow. Each company will market, package and price as it sees fit, thus enhancing competition between DBS firms and against the cable companies;

- Give Rainbow enhanced ability to market to existing DBS subscribers. During the equipment transition process (*i.e.*, the set-top box and dish swap), New EchoStar will give subscribers in need of an upgrade the option of switching their DBS service to Rainbow or of taking Rainbow service in addition to New EchoStar service; and

- Ensure open access to retail distribution. The companies are also willing to discuss other methods (beyond the non-discrimination commitments mentioned above) to ensure that Rainbow is able to attain open access to retail distribution.

In sum, as illustrated below, the EchoStar assignments would provide Rainbow a total of 62 frequencies -- more than five times the number of DBS frequencies currently assigned to Rainbow:

	61.5”W.L.	**148”W.L.**
Rainbow’s License	11 frequencies	
Echostar’s Licenses	11 frequencies	24 frequencies
Unassigned/ STA	2 frequencies	8 frequencies
Dominion Lease	6 frequencies	
Total	62 frequencies	

This amendment to the application will create a DBS competitor with a capacity to provide programming equal to, and in all probability greater than, each of the DBS entities today, eliminating all of the “uncertainties” identified by the Commission in the *HDO* concerning Rainbow’s entry in the market.[9] This means that if the Commission were to approve the merger as amended, consumers will enjoy a triple win: *first*, they will obtain virtually all of the benefits of the merger, including expanded local-into-local service, residential broadband service by satellite, and a more vigorous competitor against cable. ***Second,*** consumers will secure a second robust DBS competitor, and no reduction in the number of competing providers in the MVPD market. The creation of an additional DBS player will cure all of the countervailing competition concerns identified by the Commission even if these concerns were viewed in the light least favorable to the Applicants.[10] In addition, instead of an alleged **“3** to 2” or “2 to 1” reduction in the MVPD market, this transaction will result in “3 to 3” or “2 to 2”

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[9] ***See*** *HDO* at ¶ 143.

[10] The amendment should also allay the Commission’s spectrum policy concern about a single provider controlling all **U.S.** “full-CONUS’’ orbital locations. The combination of the two DBS wing slots will provide Rainbow with full-CONUS coverage. In fact, the 61.5° W.L. orbital location can provide service to almost all of the United States, and the 148° W.L. orbital location can provide service to well over half of the United States, including Alaska and Hawaii. This means that the two orbital locations assigned to Rainbow have overlapping coverage and that consumers in many states will be able to receive Rainbow programming from both slots.

participants in most areas of the country. *Finally,* as noted earlier, by virtue of the amended merger proposal, which will strengthen Rainbow, consumers will get in Rainbow a more powerful competitor than either EchoStar **or** DIRECTV would be alone -- a move from two spectrum-constrained DBS providers to two newly configured providers that will both be substantially strengthened compared to the status quo."

Therefore, while preserving other merger benefits, the creation of **an** additional DBS provider will cure all of the countervailing competition concerns identified by the Commission even if these concerns were viewed in the light least favorable to the Applicants. For example, the proposed divestiture condition will create an additional competitor regardless of how narrowly the relevant product and geographic markets are defined,[12] and it will eliminate the possible welfare losses feared by the Commission even accepting the worst-case scenario for such losses postulated in the *Hearing Designation Order.*

In fact, the *Hearing Designation Order* acknowledges the possibility that the merger, even if left unconditioned, might produce net welfare benefits for consumers.[13] In addition, the Applicants respectfully submit that in the *HDO* the Commission demonstrably

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[11] Rainbow will be able to compress more channels of programming from each of its DBS channels than New EchoStar, since it will not be inhibited by the burdens of legacy equipment that, as the Commission recognized in the *HDO,* hamper the Applicants. See *HDO* at ¶ 79 ("[S]ome Opponents argue that it is now feasible to use spot beam satellites that re-use spectrum much more intensively than the satellites currently used or planned by the Applicants. We agree with the Applicants, however, that the spot beam satellites on which the Opponents base their claims may not be technically and economically viable at this time.")

[12] The Applicants continue to believe firmly that the MVPD market is the relevant product market for analyzing this transaction, but the remedy proposal presented here would have the same effect – preserve the number of providers – even in the DBS industry.

[13] While the Commission substituted its own diversion rates and other numbers in the Applicants' simulation analysis, many of the cases it considered still yield significant net welfare benefits. See *Hearing Designation Order* at Appendix E, ¶ 30.

underestimated the size of the benefits to be generated by the merger, and conversely overstated the extent of the competitive harms associated with the merger. The Applicants' remedy proposal is more than adequate to neutralize the perceived competition concerns even assuming the worst set of facts and assumptions for the Applicants.

The creation of a robust DBS competitor, as described above, obviates the need for a hearing. Should the Commission refuse to suspend the hearing, however, the Presiding Officer should rule at a minimum that a hearing is not necessary on the precise product and geographic markets, or the effects of the amended transaction on viewpoint diversity and spectrum policy, as well as clarify another issue, as discussed below.[14]

111. IF A HEARING IS HELD, THE PRESIDING OFFICER SHOULD DELETE CERTAIN ISSUES THAT THE COMMISSION HAS DESIGNATED FOR HEARING

A. Product Market

A hearing on the relevant product market issue is not necessary for two reasons. First, since the Commission released its *HDO* in this proceeding, the Department of Justice has identified the MVPD market as the relevant market for evaluating this transaction.[15] The Department of Justice reached that conclusion even though it has disagreed with the Applicants on many other competition-related issues regarding this transaction. Since definition of the relevant market derives from the antitrust guidelines developed by the Department of Justice,

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[14] Of course, if these issues are not deleted because the Presiding Officer determines that they are relevant to the amended application, the Applicants reserve all of their rights to present their position on these issues.

[15] ***See*** *U.S. et al., v. EchoStar Communications* ***Corp.*** *et al,* Complaint, Case No. 1:02CV02138 (ESH), at **¶ 24** ("The relevant product market affected by this transaction is multichannel video programming distribution.")

that conclusion would be enough to obviate the need for a hearing on this issue. Moreover, the DOJ finding is consistent with congressional guidance, Commission precedent,[16] and the separate statement of Commissioner Martin in this proceeding."

Second, in any event, the amendment creates a new robust DBS competitor with the spectrum and satellite capacity to provide at least as many channels of local, regional and national programming as DIRECTV and EchoStar individually. While the Applicants believe strongly that the relevant product market for analyzing this transaction is the MVPD market, such beneficial effect would be felt even if the relevant product market were defined as narrowly as the DBS industry, contrary to the DOJ conclusion. This transaction would be a "2 to 2" even in such a narrowly defined market.

In sum, the DOJ has confirmed that the appropriate product market for the Commission's merger analysis in the proceeding is the MVPD market. However, even if the

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[16] ***In re Application of MCI Telecommunications Corp.,*** 15 Comm. Reg. (P&F) 1038 (1999), at ¶ 9 & n.29 (finding that the MVPD market was the relevant market for purposes of analyzing this DBS transfer of control application, and moreover, that "DOJ concurs with the Commission's analysis that the relevant product market is the provision of MVPD services."); ***see also Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,*** Memorandum Opinion and Order, FCC 02-310, MB Docket No. 02-70, at ¶ 89 (rel. Nov. 14, 2002) ("[B]ased on the record before us and consistent with our precedent, we find that the relevant product market for evaluating mergers of cable operators is 'multichannel video programming service' distributed by all MVPDs.")

[17] ***See*** *HDO,* Statement of Commissioner Kevin J. Martin ("The majority is unwilling to conclude that cable and DBS services compete.. ..This conclusion seems to contradict prior Commission precedent. Defining the relevant product market as DBS services would mean that in urban areas served by cable, our analysis would exclude cable operators as a viable alternative. Such an approach is not reflective of the actual competitive landscape in urban areas and diminishes the real challenges faced by rural consumers to obtain comparable services. Indeed, I am disappointed that the Commission seems to be taking a step away from the conclusion that at least some cable operators and DBS providers compete, despite having repeatedly reached that decision in the past.")

Commission were to define the product market more narrowly (an exercise that Applicants believe simply cannot be supported by the record), there can be no negative competitive implications from the amended proposal because it ensures the creation of a second DBS competitor with a capacity to provide programming equal to, and in all probability greater than, each of the DBS entities today. Thus, the Commission should delete the product market issue from the hearing.

B. Geographic Market

Similarly, the creation of a new DBS competitor with full U.S. coverage eliminates the need to conduct an evidentiary hearing on the precise geographic market in order to analyze the effects of the proposed merger. Even if the Commission were to assume that the market was local and should be aggregated into certain categories (*e.g.,* markets served or not served by cable),[18] there would be no diminution of competition in any of these geographic markets because consumers would still have the ability to choose between two DBS providers and cable (where available). Thus, the Presiding Officer need not conduct an evidentiary hearing on this issue. For the reasons explained in the amended application, the transaction similarly does not raise competitive concerns in the few areas of the country where Cablevision provides cable service.

Even if the Presiding Officer were to consider the geographic market issue as part of the hearing, he need not examine the issue of the relative number of households in each of the geographic markets aggregated for purposes of its merger analysis (*i.e.,* homes passed versus

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[18] Because, as noted above, the appropriate product market is the entire MVPD market, there is no basis upon which to subdivide the geographic market further (*i.e.*, markets served by low-capacity versus high-capacity cable systems). ***See*** *HDO* at ¶¶ 114-115.

homes not passed by cable). Significantly, the Commission has found repeatedly in its annual report on MVPD competition that cable passage rates are approximately 97% based on data from Paul Kagan Associates.” The Commission has time and again rejected challenges to the Kagan data in its annual MVPD competition reports?’ Moreover, the remedy proposed by the Applicants means that the merger will not result in a “2 to 1” consolidation anywhere in the country (the concern that was the impetus for the “homes passed inquiry). Given the consistent findings of the Commission and the fact that further inquiry into the number of homes passed has been mooted by the remedial measures proposed by the Applicants, the Presiding Officer should delete this and other geographic market issues from the hearing.

C. Viewpoint Diversity

The Commission’s potential concern with respect to viewpoint diversity arises because it initially found that Rainbow is not a market participant and would not enter the MVPD market in a manner sufficient to exert competitive pressure on New EchoStar within a reasonable period. Thus, the Commission concluded that the MVPD market would be left with only one DBS provider, which could negatively affect viewpoint diversity?’

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[19] *See Annual Assessment of the Status of Competition in the Marketfor the Delivery of VideoProgramming,* Eighth Annual Report, 15 Comm. Reg. (P&F) 818, at Appendix B, Table B-1 (2002) (households passed by cable has ranged from 96.4% to 97.1% between 1993 and 2001).

[20] *See Annual Assessment of the Status of Competition in the Marketfor the Delivery of VideoProgramming,* Eighth Annual Report, 17 FCC Rcd. 1244, 1254-55 (2002); *Annual Assessment of the Status of Competition in the Marketfor the Delivery of VideoProgramming,* Seventh Annual Report, 16 FCC Rcd. 6005,6016-17 (2001); *Annual Assessment of the Status of Competition in the Marketfor the Delivery of VideoProgramming,* Sixth Annual Report, 15 FCC Rcd. 978, 988-89 (2000).

[21] *HDO* at ¶¶ 50, 52 (“For purposes of our review of the proposed transaction in this proceeding, however, we find that DBS operators do contribute to viewpoint diversity and that

The ameliorative measures proposed by the Applicants eliminate this concern entirely by ensuring the creation of another viable DBS competitor, thereby retaining two DBS nationwide providers and preserving -- and indeed enhancing -- viewpoint diversity. Rainbow's focus on local and regional programming will provide a new and unique perspective to enhance viewpoint diversity. Accordingly, this issue should be deleted as well.

D. Spectrum Policies

The Commission suggested that the merger transaction, as originally proposed, called into question FCC spectrum policies because the Commission has never licensed all of the spectrum available in a particular service to a single commercial licensee.[22] The Commission's concern, however, is entirely misplaced.

First, the *HDO* erred in its assertion that the Commission has never "permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service,"[23] or that the Applicants "have cited no example" where the Commission has done so.[24] The Applicants' Opposition to Petitions to Deny and Reply Comments, filed February 25,2002, noted that the Commission has, in fact, sanctioned the use of all of the spectrum

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the loss of one such provider would diminish the diversity available to American consumers.. ..The loss of the editorial function provided by one DBS operator diminishes viewpoint diversity by reducing the number of such editors available to American consumers.")

[22] *HDO* at ¶ 277.

[23] ***Id.;see*** *also* FCC Press Conference, Commission's Decision Regarding EchoStar-DIRECTV Merger Application, Statement by W. Kenneth Ferree, Chief, Media Bureau, FCC (Oct. 10,2002) ("There's no other instance in FCC history that I am aware of in which we have given all of the spectrum in any one particular service to a single entity.")

[24] *HDO* at ¶ 277.

allocated to a particular service by one licensee.[25] When the Commission first established the Mobile Satellite Service ("MSS") in the L-band, it received competing applications from 12 companies, invited all the applicants to form one consortium, American Mobile Satellite Corporation, and gave one license to that entity. The Commission purposefully elected to license one large consortium as opposed to multiple smaller entities because, among other things: **a** larger amount of bandwidth would permit a greater variety of services to be provided by an MSS system, and a larger customer base to be served; the high cost of an MSS system and the amount of spectrum available for MSS warranted the licensing of one MSS system using the entire allocated spectrum; and joint ownership of an MSS system would best permit a variety of mobile satellite services to be made expeditiously available to the public.[26] These same considerations justify the creation of New EchoStar to a much greater extent, even if there were not ample spectrum resources in the same band available for other competing providers?'

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[25] *See* Applicants' Opposition to Petitions to Deny and Reply Comments, CS Docket No. *01-348,* at **33** (Feb. 25,2002).

[26] *See Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Periaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, 2* FCC Rcd. 485 (1987), *recon. denied, 4* FCC Rcd. *6016 (1989);Amendment of Parts 2, 22 and 25 of the Commission's Rules* io *Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, 4* FCC Rcd. *6041* (1989), *rev'd in part and remanded, Aeronautical Radio, Inc. v. FCC,* 928 F.2d *428* (D.C. Cir. 1991), *on remand, Amendment of Paris 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Mobile Satellite Service for the Provision of Various Common Carrier Services,* **6** FCC Rcd. *4900 (1991);Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services,* 7 FCC Rcd. *266* (1992), *petitions for review dismissed, Aeronautical Radio, Inc. v. FCC, 983* F.2d 275 (D.C. Cir. *1993).*

[27] Moreover, in its recently promulgated service rules for DBS, the Commission specifically declined to impose a limit on the amount of DBS spectrum to which a single entity

Second, even if the Commission's spectrum policy concerns were valid, the amended application ameliorates any concerns the Commission may have had in this regard. Rainbow originally planned to provide nationwide coverage from a handful of DBS frequencies at the 61.5° W.L. orbit location only. The amendment proposed by the Applicants affords Rainbow access to five times the amount of spectrum it originally intended to use, as well as access to the 148° W.L. orbital location in addition to resale rights for programming provided from New EchoStar's full-CONUS slots. This combination of DBS frequencies, eastern and western orbital locations, and access to New EchoStar's full-CONUS programming provides Rainbow with true full-US. coverage and the spectrum and satellite resources to provide a unique package of local, regional and national programming. Indeed, Rainbow will have a competitive advantage in many parts of the eastern United States where elevation angles to the 61.5° W.L. orbital location are higher than those of the traditional "CONUS" slots and where terrain or other obstructions previously precluded DBS service.

In view of the foregoing, including the full-US. DBS service to be provided by Rainbow, the Commission's spectrum policies are not implicated by the amended merger transaction.

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can be licensed. ***See Policies and Rules for Direct Broadcast Satellite Service,*** Report and Order, 17 FCC Rcd. 11331, 11397-99 (2002) ("[B]ecause we continue to view DBS as offering a strong competitive alternative to cable systems, we have not found any competitive problems with allowing a DBS operator in more than one full-CONUS orbital position, and indeed allowing such operation may enable DBS operators to better compete with cable systems in the future. Consequently, we will not adopt any restrictions on the number of full-CONUS orbital locations one satellite company can control.")

IV. IF A HEARING IS HELD, THE PRESIDING OFFICER SHOULD CLARIFY AN ISSUE THAT THE COMMISSION HAS DESIGNATED FOR HEARING

The Commission has already found in the *HDO* that, compared to the merger, it would be harder for the Applicants to replicate *all* of the merger benefits by a joint venture or other alternative. As the *HDO* states, alternative means of achieving comparable efficiencies appear to have significant operational and economic disadvantages.[28] However, other parts of the *HDO* express the view that discrete benefits might be achievable through other means. See *HDO* at ¶ 81 ("With regard to whether similar spectrum efficiencies might be achieved through a joint venture, we find that the Applicants have not demonstrated that this is technologically unfeasible. The Applicants' criticisms of a joint venture are based largely on business issues. They present no immutable reason why these issues could not be addressed through appropriate business arrangements."); ***id.*** at ¶ 229 ("it is not clear that the benefits of consolidation could not be achieved by other means, such as a joint venture, that would be less likely to have anti-competitive effects.").

In light of the Commission's over-arching recognition that alternatives to the merger would have significant disadvantages, it is unnecessary as a matter of law to conduct a hearing on whether it would be possible to achieve any of the benefits by other means or whether there is an "immutable" reason why this is not possible. **A** finding that the merger will *facilitate* the achievement of the merger benefits has consistently been enough in the Commission's merger precedent. In both the *AT&T-MediaOne* and AOL-Time Warner merger proceedings, for example, in which the Commission granted the proposed merger, the Commission stated that while it was "not persuaded that the proposed merger [was] the only means to assure [all of the

[28] See *HDO* at ¶ 57.

benefits of the merger]," it was sufficient that the merger would accelerate or facilitate the achievement of such benefits and thus serve the public interest.[29] In rejecting joint operating approaches suggested by opponents in the aforementioned merger proceedings, the Commission identified various difficulties associated with joint ventures (*i.e.,* high degree of risk, changing and complex technology, more than one product involved, etc.),[30] and concluded that an "alignment of the parties' economic interests [through a merger would] reduce the areas of friction between the two companies" and facilitate the development of new services.[31]

Consistent with these decisions, the Commission's acknowledgement that alternatives to the merger are hampered by significant disadvantages should end the inquiry into such alternatives. Therefore, the question of whether a joint venture or other joint operating alternative is likely to yield any public benefits should not be the subject of an evidentiary hearing and the more general issue as to whether the proposed transaction is likely to yield any public benefits should be clarified accordingly.

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[29] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee,* Memorandum Opinion and Order, 15 FCC Rcd. 9816, 9890-91 (2000) ("*AT&T-MediaOne Memorandum Opinion and Order"); see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee,* Memorandum Opinion and Order, 16 FCC Rcd. 6547, 6677 (2001) *("AOL-Time Warner Memorandum Opinion and Order").*

[30] *See generally id*

[31] *AT&T-MediaOne Memorandum Opinion and Order,* 15 FCC Rcd. at 9891; *AOL-Time Warner Memorandum Opinion and Order,* 16 FCC Rcd. at 6676.

V. CONCLUSION

For the foregoing reasons, the Applicants respectfully request that, if the Commission declines to suspend the hearing or, having suspended the hearing, subsequently reinstates it, the Presiding Officer delete four of the issues identified by the Applicants in this motion that have been designated for hearing in the *HDO* and clarify another. In addition, should the Commission, having suspended the hearing, subsequently reinstate it, the Applicants reserve the right to amend or supplement this motion to reflect intervening developments.

Respectfully submitted,

Gary M Epstein /CW

Gary M. Epstein
James H. Barker
Latham & Watkins
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Hughes Electronics Corporation and General Motors Corporation

P. Michalopoulos/CW

Pantelis Michalopoulos
Philip L. Malet
Carlos M. Nalda
Rhonda M. Bolton
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-6494

Counsel for EchoStar Communications Corporation

November 27,2002

CERTIFICATE OF SERVICE

I hereby certify that on this 27'' day of November 2002, a copy of the foregoing was sent by first-class mail (or by hand delivery as indicated by asterisk) to the following:

* Honorable Richard Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

* Charles Kelly, Esq.
Chief, Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW, Room 3-B431
Washington, D.C. 20554

Christopher C. Cinnamon, Esq.
Cinnamon Mueller
307 North Michigan Avenue, Suite 1020
Chicago, IL 60601
Counsel to American Cable Association

Henry L. Bauman
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Ted S. Lodge, Esq.
Pegasus Communications Corp.
225 City Line Avenue, Suite 200
Bala Cynwyd, PA 19004

Patrick J. Grant, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1206
Counselfor Pegasus Communications Corp.

William D. Silva, Esq.
Law Offices of William D. Silva
5335 Wisconsin Avenue, N.W., Suite 400
Washington, D.C. 20015-2003
Counsel to the Word Network

Alan C. Campbell, Esq.
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W., Suite 200
Washington, D.C. 20036-3101
Counsel to Family Stations, Inc.

Peter Tannenwald, Esq.
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W., Suite 200
Washington, D.C. 20036-3101
Counsel to North Pacific International Television, Inc.

Jack Richards, Esq.
Keller and Heckman LLP
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001
Counsel to National Rural Telecommunications Cooperative

Stephen M. Ryan, Esq.
Manatt, Phelps & Phillips, LLP
1501 M Street, N.W., Suite 700
Washington, D.C. 20005
Counsel to National Rural Telecommunications Cooperative

Arthur V. Belendiuk, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W.
Suite 301
Washington, D.C. 20016
Counsel to Johnson Broadcasting of Dallas, Inc.

Debbie Goldman, Esq.
Communications Workers of America
501 Third Street, N.W.
Washington, D.C. 20001

Kemal Kawa, Esq.
O'Melveny & Myers LLP
1650 Tysons Boulevard
McLean, VA 22102
Counselfor Northpoint Technology, Ltd.

John R. Feore, Jr., Esq.
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
Counselfor Paxson Communications Corporation

Mark A. Balkin, Esq.
Hardy, Carey & Chautin LLP
110 Veterans Blvd., Suite 300
Metairie, LA 70005
Counsel to Carolina Christian Television, Inc. and LeSea Broadcasting Corporation

Scott R. Flick, Esq.
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
Counsel to Univision Communications

Barry D. Wood, Esq.
Wood, Maines & Brown, Chartered
1827 Jefferson Place, N.W.
Washington, D.C. 20036
Counsel to Eagle 111 Broadcasting, LLC

Barry D. Wood, Esq.
Wood, Maines & Brown, Chartered
1827 Jefferson Place, N.W.
Washington, D.C. 20036
Counsel to Brunson Communications, Inc.

Todd B. Lantor